FILE COPY

FILED
APR 3 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1942

No. 8[redacted] 33

IN THE MATTER OF THE PROCEEDINGS TO ENFORCE PAYMENT OF DELINQUENT PERSONAL PROPERTY TAXES FOR THE YEAR 1939.

NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA AND SUPPORTING BRIEF.

M. J. DOHERTY,
W. E. RUMBLE,
Saint Paul, Minnesota,
Attorneys for Petitioner.

DOHERTY, RUMBLE, BUTLER,
SULLIVAN & MITCHELL,
Saint Paul, Minnesota,
Of Counsel.

SUBJECT INDEX.

	Page
Summary Statement	2
Questions Presented	3
Basis of Jurisdiction	3
Reason for Allowance of Writ	4
Statement of Case	6
Assignments of Error	7
Argument	8
Denial of Due Process of Law	8
Rolling Stock Cases	8
Basis of Majority Opinion	11
Place of Domicile Not Controlling	11
No "Equivalent" of Protection	14
No Distinction between Proportions and Specific Items of Tangible Property	15
Cases on Taxation of Intangibles	16
The Statutes	18
Conclusion	19

TABLE OF CASES.

	Page
American Refrigerator Transit Company v. Hall, 174 U. S. 70	8, 9
Blackstone v. Miller, 188 U. S. 189	16, 17
Blodgett v. Silberman, 277 U. S. 1	17
Curry v. McCanless, 307 U. S. 357	16, 17
Delaware L. & W. R. R. Co. v. Pennsylvania, 198 U. S. 341	11, 14, 16
First National Bank v. Maine, 284 U. S. 312	16, 18
Frick v. Pennsylvania, 268 U. S. 473	11, 14, 16

Johnson Oil Refining Co. v. Oklahoma, 290 U. S. 158 ..... 8, 9, 13
Marye v. Baltimore & Ohio R. R. Co., 127 U. S. 117.. 8
Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 86 L. Ed. 745 4
Pullman Company v. Richardson, 261 U. S. 330..... 8
Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18 ..... 8, 9
State Tax Commissioner v. Aldrich, 316 U. S. 174....16, 18
Union Refrigerator Transit Company v. Kentucky, 199 U. S. 194 ..... 8, 9, 11, 14
Union Refrigerator Transit Company v. Lynch, 177 U. S. 149 8
Union Tank Line Company v. Wright, 249 U. S. 275.. 8
Wheeling Steel Corporation v. Fox, 298 U. S. 193.... 17
Wisconsin v. J. C. Penney Co., 311 U. S. 435..... 16

STATUTES CITED.

Judicial Code, Sec. 237 (b), 28 U. S. C. A., Sec. 344.. 3
Minnesota Statutes, 1941—
Section 272.01 18
Section 273.01 18

Supreme Court of the United States

October Term, 1942

No. .....

IN THE MATTER OF THE PROCEEDINGS TO ENFORCE PAYMENT OF DELINQUENT PERSONAL PROPERTY TAXES FOR THE YEAR 1939.

NORTHWEST AIRLINES, INC.,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Northwest Airlines, Inc., hereby petitions for review, upon writ of certiorari, of the decision and judgment of the Supreme Court of Minnesota, being the court of last resort of that State, and respectfully shows:

SUMMARY STATEMENT OF MATTER INVOLVED.

This is an action by the State of Minnesota to recover from Northwest Airlines, Inc. the amount of an alleged delinquent personal property tax (and penalty) assessed against the Airlines for the year 1939. The tax was upon the entire fleet of airplanes owned by the Airlines and operated by it in interstate transportation of persons and property. The action was contested by the Airlines on the ground that the levy and assessment of the tax was in violation of the commerce, due process, and equal protection clauses of the Federal Constitution, and also of certain provisions of the Constitution of Minnesota. The court of first instance (District Court of Ramsey County, Minnesota) overruled the objections, held the assessment valid, and rendered judgment in favor of the State and against the Airlines for the sum of $18,266.68. Upon appeal to the Supreme Court of Minnesota, this judgment was affirmed (three justices dissenting) and a petition for rehearing was denied.

The case was tried upon a stipulation of facts. From this stipulation, and the findings based thereon, it appears that the Airlines is a Minnesota corporation engaged in the transportation of persons and property, including mail, in interstate commerce, involving the operation of its aircraft on regular schedules through and serving seven states and a province of Canada. No particular airplanes are allotted to any route or section. All are operated interchangeably over the whole system. The result is that while no specific planes can be allocated to any state, a proportion of the entire fleet is capable of being so allocated on a plane mileage, route mileage, or similar basis. (Amended Stipulation of Facts, paragraphs I to VIII.)

The position of the Airlines was and is that Minnesota is without jurisdiction to tax the entire fleet of airplanes on a full *ad valorem* basis; that it can, within its constitutional power, tax only that proportion of the fleet which is regularly and habitually used in the state; that a corresponding right is enjoyed and is in fact exercised by each of the other states through which the planes operate, and that authority in such other states to tax proportions of the fleet is incompatible with authority in Minnesota to tax the whole.

QUESTIONS PRESENTED.

The ultimate questions thus presented are whether the enforcement of the tax as levied would deprive the Airlines of its property without due process of law or deny it the equal protection of the laws, in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States, or would place an unlawful burden on interstate commerce, in violation of Article I, Section 8, of the Constitution of the United States.

BASIS OF JURISDICTION.

A review of the judgment is plainly within the jurisdiction of this Court, under Section 237(b) of the Judicial Code (28 U. S. C. A., Section 344), authorizing such review:

> "Where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * * of * * * the United States."

The citation by which the action was instituted by the State did not designate the statute under which the right to

impose the tax was asserted. The answer of the Airlines (interposed in the District Court), alleges that the levy and assessment of the tax is in violation of the defendant's rights under the due process, equal protection, and commerce clauses of the Federal Constitution, without conjecture as to the statute under which the State had assumed to impose the tax (Section X of defendant's answer). This position was adhered to on appeal to the State Supreme Court, where the same constitutional objections to the tax were raised by assignments of error and argument. In the circumstances, the procedure available to the Airlines appears to be by application for certiorari rather than by appeal. *Memphis Natural Gas Co. v. Beeler,* 315 U. S. 649, 86 L. Ed. 745.

The judgment sought to be reviewed was entered in the Supreme Court of Minnesota on December 31, 1942.

A copy of the findings of fact and conclusions of law of the District Court is found in the record, immediately following the Amended Stipulation of Facts.

A copy of the opinions (majority and minority) of the Supreme Court of Minnesota are included in the printed record near the conclusion thereof. The decision is reported in 7 N. W. (2d) 691, but has not yet appeared in the Minnesota Reports.

REASON FOR ALLOWANCE OF WRIT.

The Supreme Court of Minnesota has decided a Federal question of substance in a way that is not in accord with the applicable decisions of this Court.

The questions presented are of grave importance not only to this Airline but to the entire air transport in-

dustry in the United States. Upon the answers to these questions depends the liability of this and other Airlines to inordinately burdensome multiple taxation of their aircraft employed in interstate transportation. The importance of the matter to the Airlines is too apparent to require emphasis. The matter is in fact one of threefold concern: *first*, to the Airlines, that intolerable burden of multiple taxation be avoided; *second*, to the States, that there be an equitable sharing of the revenues to be derived from legitimate taxation of airplanes employed in interstate flights, and, *third*, to the general public, that there be an opportunity for normal development, unhampered by oppressive taxation, of a young and rapidly growing industry vital to the national welfare.

More broadly there is involved the general question of whether tangible personal property may be subjected to multiple taxation; whether such property may have a tax situs in more than one state, or whether as to such property tax liability in one state is correlative with immunity in others.

With respect to the taxation of airplanes, the questions presented are of first impression, but the applicable principle has been established by this Court in cases involving taxation of the rolling stock of interstate railroads. The decisions of this Court in such cases are in direct conflict with the decision of the Supreme Court of Minnesota in the instant case, and a consistent application of the rule established by them necessarily condemns the present tax. The rolling stock cases will be analyzed in the brief supporting this petition.

STATEMENT OF THE CASE.

Some factual details, in addition to the foregoing summary statement, seem desirable, particularly in reference to the nature of the Airlines' business and the manner of its operation. It operates a fleet of air transport planes between Chicago and Seattle and Portland and a connecting line between Fargo, North Dakota, and Winnipeg, Canada. On its Chicago-Pacific Coast route it serves seven states, in the course of which it makes regular scheduled landings in seventeen cities, two of which are in Minnesota. The total route mileage in May, 1939, was 2,466 miles, of which 320.2 miles, or fourteen per cent, were in Minnesota. The daily plane mileage was 14,414 miles, of which 2,348.4 miles, or sixteen per cent, were in Minnesota. At seven of its landing points it operates hangars and business offices, two of which (at Chicago and Fargo) are owned. Five are leased. At the other ten landing points it leases office and other space for its business headquarters and activities. At each point it has a station manager, radio operator, and other employees. On its Chicago-Pacific Coast route there are four flight crew bases, representing the termini of flight crew divisions, where the crews begin and end their runs and make their headquarters. Fargo to Winnipeg is one division. Also there are six so-called maintenance bases, one of which is at Minneapolis. At these bases are maintained completely manned and equipped service stations for the repair and maintenance of planes. At Saint Paul there is maintained a service station for major overhaul and repair work. (Amended Stipulation of Facts paragraphs II to VI and XII.)

On both routes the Airlines' planes, as a matter of practical operation, are obliged to and do follow approximately fixed courses of travel. This is made necessary by the regular landing points, by the radio range courses operated by the Civil Aeronautics Authority, and by the regular series of emergency landing fields, also maintained by the Authority. The Airlines operates under a certificate of convenience and necessity issued by the Civil Aeronautics Board, which fixes both its terminal points and all intermediate stops. Its course is prescribed, and the law permits neither deviation nor abandonment. (Amended Stipulation of Facts paragraphs V and VIII.)

ASSIGNMENTS OF ERROR.

The Supreme Court of Minnesota erred:

1. In affirming the judgment of the District Court of Ramsey County, Minnesota.

2. In holding the tax valid.

3. In holding that appellant's entire fleet of airplanes had a taxable situs in Minnesota.

4. In holding that any given portion of appellant's airplanes might have a tax situs in more than one state.

5. In holding that the tax was not a violation of Section 8 of Article I of the Constitution of the United States and in refusing to hold the contrary.

6. In holding that the tax was not a violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States and in refusing to hold the contrary.

ARGUMENT.

Enforcement of the Tax in Question Would Deprive the Airlines of Its Property Without Due Process of Law.

The decision of the Supreme Court of Minnesota is wholly out of accord with the applicable decisions of this Court respecting taxation of tangible personal property, and appears to be largely the result of an endeavor to apply to the case what was said by this Court respecting taxation of intangibles, or more accurately to apply the interpretation placed by the majority below upon what was so said.

Rolling Stock Cases.

The true rule applicable under the facts of this case is that laid down by this Court in the so-called rolling stock cases. That rule is that equipment habitually employed in interstate transportation of persons and property between and through several states is taxable by each of the states on an average or proportionate basis only, and is not taxable by any of the states in its entirety. *Marye v. Baltimore & Ohio R. R. Co.*, 127 U. S. 117; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *American Refrigerator Transit Company v. Hall*, 174 U. S. 70; *Union Refrigerator Transit Company v. Lynch*, 177 U. S. 149; *Union Refrigerator Transit Company v. Kentucky*, 199 U. S. 194; *Union Tank Line Company v. Wright*, 249 U. S. 275; *Pullman Company v. Richardson*, 261 U. S. 330; *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158. The rule could be stated in broader terms, but the foregoing covers the case.

In *Johnson Oil Refining Co. v. Oklahoma,* supra, the facts were that the Refining Company, an Illinois corporation, operated a refinery in Pawnee County, Oklahoma, from which it shipped oil in its own tank cars into many states. A tax laid by Oklahoma on the entire fleet of cars was held to be in violation of the due process clause of the Fourteenth Amendment. This Court said:

> "When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the same but are constantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits."

In *Union Refrigerator Transit Company v. Kentucky,* supra, an attempt was made by the State of Kentucky to tax in its entirety an aggregate of railroad cars owned by the Transit Company, a Kentucky corporation, portions of which were habitually used in other states by shipper lessees. This tax was also held to be in violation of the Fourteenth Amendment. As illustrating the rule of apportionment which must be applied in such cases, the Court said, referring to its previous decision in *Pullman's Palace Car Co. v. Pennsylvania,* 141 U. S. 18:

> "We have also held that, if a corporation be engaged in running railroad cars into, through and out of the State, and having at all times a large number of cars within the State, it may be taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars

> are run within the State bears to the whole number of miles in all the States over which its cars are run."

In *American Refrigerator Transit Co. v. Hall,* supra, this Court sustained a tax by the State of Colorado based upon the average number of the Refrigerator Company's cars employed in the state during the period in question, with this comment:

> "We think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed."

The facts of these cases are indistinguishable in principle from those of the instant case, and the rule there established should control. The Supreme Court of Minnesota was agreed (1) that the rolling stock rule is as applicable to airplanes as to railroad cars; (2) that some proportion of the Airlines' planes acquired a situs in other states, and to that extent were taxable in such states; (3) that the power of each such other state to tax was limited to the average number of planes within its borders during the tax period; (4) that if a specific item of tangible personal property acquired a situs in another state, it could not be taxed at the owner's domicile. The Court said: "The question * * * is * * * one of when and under what conditions the state of the owner's domicile loses jurisdiction to tax tangible personal property moving about from state to state."

Basis of Majority Opinion Below and Errors Involved Therein.

From the premises just reviewed the invalidity of the tax would seem to inevitably follow. The Court below reached the contrary conclusion, apparently upon the following main considerations: (1) Notwithstanding its disclaimer of reliance upon the doctrine of *mobilia sequunter personam,* large importance was attributed to the presence in Minnesota of the corporate domicile and main business office of the Airlines; (2) that all of defendant's airplanes were at some time during the year in the State, and that major repairs were made there; (3) that the Airlines shared in the benefit of the government and laws of the State; (4) certain recent decisions of this Court were evidently interpreted as indicating a trend towards the view that tangible personal property may have a tax situs in and be taxed by more than one State.

Place of Domicile and of Main Business Office Not Controlling.

That the Airlines was chartered by Minnesota is not a controlling fact at least as to tangible property having a tax situs elsewhere. The personal property in question (proportion of planes habitually used outside Minnesota) was found below to have acquired a tax situs in other states. This excluded it from taxation by Minnesota. *Delaware L. & W. R. R. Co. v. Pennsylvania,* 198 U. S. 341; *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S. 194; *Frick v. Pennsylvania,* 268 U. S. 473.

In the *Union Refrigerator Transit Company* case (to which brief reference has already been made), this Court condemned an attempt by Kentucky, the company's domi-

cile, to tax its rolling stock employed in other states. The Court below thought this case distinguishable from the instant case on the ground that in the Transit Company case some of the cars were never physically in Kentucky during the tax period, while in the present case it was found that, although only a part of the Airlines' fleet had been in Minnesota on May 1, 1939, the assessment valuation date, all of its planes had been in the State at times during the year. The decision in the Transit Company case does not rest upon any such narrow distinction, and it becomes at least doubtful that the Court below correctly construed the language of the opinion when read in the light of the facts as they appear from the findings of the County Court of Kentucky, not questioned on appeal. The County Court determined:

> "* * * that the transit company was the owner of two thousand cars in September, 1897, 1898, 1899, and 1900 * * *; that the correct method of ascertaining the number of cars which should be assessed for taxation was to ascertain and list *such a proportion* of its cars as *under a system of averages* upon their gross earnings were shown to be used in the state of Kentucky during the fiscal year, the court finding *by this method* that there were subject to assessment in Kentucky twenty-eight cars for the year 1897, twenty-nine for the year 1898, forty for the year 1899, and sixty-seven for the year 1900." (Italics supplied.)

This finding obviously does not refer to any particular twenty-eight, twenty-nine, forty, or sixty-seven cars, but only expresses the conclusion that that was the *average number* of cars in the state during the respective years in question. The ratio may render it improbable that each of the two thousand cars was at any time in the state dur-

ing any year, but that is not impossible. If the Court considered the point of any decisive significance, some comment might have been expected upon it. When the Court referred to the property involved as being "permanently located in other states and employed there", it may well have referred to the *proportion* of the company's cars so located and used rather than to specific cars. It is hardly conceivable that the decision of this Court would have been different had it affirmatively appeared that all of the Transit Company's cars had at some time during the year been in Kentucky

That the location in Minnesota of the Airlines' main business office and hangar for major repair work is not of controlling significance is determined by the decision in *Johnson Oil Refining Co. v. Oklahoma,* before discussed. The Refining Company used its own fleet of tank cars for the shipment of its products into various states. After making deliveries the cars returned to the refinery, where they were repaired as needed, refilled, and reshipped or held for later use. The refinery was the operational headquarters of the company. Yet a tax by Oklahoma on the entire fleet of cars was held invalid, the Court saying:

> "The jurisdiction of Oklahoma to tax property of this description must be determined on a basis which is consistent with the like jurisdiction of other states."

The corporate domicile and business headquarters of the Airlines could at most draw the property in question to the jurisdiction of Minnesota for taxation only if that property had no tax situs elsewhere. It was determined by the Court below that it did have a tax situs elsewhere.

Tax Not Justified On Theory of "Equivalent" of Protection.

The authority to tax is also predicated upon supposed governmental protection given in return by the State of Minnesota. One of the authorities cited in support of this theory is *Union Transit Company v. Kentucky*, 199 U. S. 194, in which the Court said:

> "The power of taxation * * * is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his property * * *."

The equivalence here spoken of does not require that the benefits of government be appraised in dollars and cents and balanced against the tax. It does, however, require at least a theoretical "equivalent" having some minimum limit. Also the protection and benefits must be with respect to the particular property in question rather than to the taxpayer generally. Defendant's franchise to exist as a corporation under the laws of Minnesota and the privilege of exercising corporate management and business direction in that state is obviously not such a benefit in relation to the corporation's tangible property located elsewhere as to authorize the taxation of that property. *Delaware L. & W. R. R. Co. v. Pennsylvania*, 198 U. S. 341; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; *Frick v. Pennsylvania*, 268 U. S. 473. The benefits must have a more direct relation to the property. The impossibility of an "equivalent" in the present case seems self-evident. The majority opinion below recognizes the right of other states to tax a *proportion* of defendant's planes on the assumption, presumably, that those states give in return an equivalent of protection. Such an assumption precludes justification of a like tax by the State of Minnesota upon the same property on the

theory of another equivalence of protection. If such a claim be sustained, then a dozen or more states traversed by an air route might with equal show of right impose a full tax upon the air transport company's fleet of planes upon the pretext of an equivalent of protection. The havoc which might be wrought upon this industry by such a doctrine can readily be seen.

No Distinction Respecting Situs Between Proportions and Specific Items of Tangible Personal Property.

The Court below appears to draw a distinction between tangible personal property represented by specific items and tangible personal property represented by proportions. This is illogical and contrary to the rolling stock cases. The supposed distinction disregards the conception which permits taxation of different *proportions* of the same property by different states. Situs in such cases is based upon habitual use. Habitual use of a *proportion* is deemed for tax purposes the legal equivalent of permanent location of specific items equal in the aggregate to the given proportion. In either case the tax is upon *tangible* personal property. There is nothing else to tax. This is merely like saying that a tax upon an undivided interest in land is a tax upon real estate. A *proportion* is no more capable of having a permanent location or situs in two different states, and therefore of being taxable in both, than would any individual item of the tangibles represented in the proportion. Hence the situs of a proportion of defendant's planes beyond the State (as found by the Court below) just as effectively removes that proportion from the State's jurisdiction as would a foreign situs of specific planes.

Cases On Taxation of Intangibles.

The majority opinion below finally rests largely upon the supposed significance of the decisions of this Court in *State Tax Commissioner v. Aldrich,* 316 U. S. 174, and *Curry v. McCanless,* 307 U. S. 357. *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435, a privilege tax case, is also referred to, but rather for general language used than for what was decided. The *Aldrich* and *McCanless* cases are apparently construed as erasing all distinction between tangible and intangible personal property as respects multiple tax situses and liability to tax in more than one state. *"Property",* the Court said, "may have a situs in more than one state. * * *" The *Aldrich* and *McCanless* cases have no such broad implication. They were concerned with transfer taxes upon intangibles, and jurisdiction to tax was discussed only in terms of intangibles and of the nature and characteristics of that class of property. There was a careful avoidance of indiscriminate reference to personal property generally or the inclusion of tangibles with intangibles. In the *Aldrich* case, as the Court below observed, *First National Bank v. Maine,* 284 U. S. 312, was overruled, and *Blackstone v. Miller,* 188 U. S. 189, was reinstated. But again both of these cases dealt only with succession taxes on intangibles. It is important to note that there has been no overruling of *Frick v. Pennsylvania,* 268 U. S. 473, or of *Delaware L. & W. R. R. Co. v. Pennsylvania,* 198 U. S. 341, or of the decisions in the rolling stock cases. These are the cases that established the rule with reference to the taxation of tangibles. In the *Frick* case, this Court held Pennsylvania to be without power to impose a tax on transfer by death of a Pennsylvania resident in respect of tangible personal property located else-

where. The State urged as authority for the tax *Blackstone v. Miller* and a subsequent case. The comment of this Court was:

> "Both cases related to intangible personalty, which has been regarded as on a different footing from tangible personalty. When they are read with this distinction in mind, * * * it is apparent that they do not support the tax in question."

The same distinction is implicit in *Curry v. McCanless,* 307 U. S. 357, involving inheritance and succession taxes upon intangible property in which the opinion spoke of the "cleavage between the rules of law applicable to tangibles and those relating to intangibles", and said:

> "That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located * * * for purposes of taxation, is a doctrine generally accepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since."

And later added:

> "Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things."

For another decision drawing the same distinction, see *Blodgett v. Silberman,* 277 U. S. 1. In *Wheeling Steel Corporation v. Fox,* 298 U. S. 193, 209, it was said:

> "When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception."

It is noteworthy that all of the decisions cited in the *Aldrich* case as supporting that decision and as condemning *First National Bank v. Maine* (with one exception not here significant) are decisions involving the taxation of intangible property. There is nothing in these cases marking a departure from the established rule that tangible personal property can have but one situs, and therefore can be but once taxed.

The Statutes.

It may be of interest to the Court to know of the basic taxing statutes of Minnesota.

Section 272.01, Minnesota Statutes, 1941 (Section 1974, Mason's Minnesota Statutes, 1927), reads as follows:

> "All real and personal property in this state and all personal property of persons residing therein, including the property of corporations, * * * is taxable * * *."

This statute was considered by the Court below to be authority for the tax. That there is no other statutory authority for it will probably be conceded by the State. This statute, literally read, taxes all tangible as well as intangible personal property of persons residing in the State, even though physically and permanently located elsewhere. So construed, the statute would manifestly be unconstitutional as authorizing the taxation of property wholly beyond the State's jurisdiction.

Section 273.01, Minnesota Statutes, 1941 (Section 1984, Mason's Minnesota Statutes, 1927), reads in part as follows:

> "Personal property shall be listed and assessed annually with reference to its value on May 1, and if ac-

quired on that day shall be listed by or for the person acquiring it."

On May 1, 1939, only a part of the Airlines' fleet of airplanes was in the State of Minnesota at any time during the day, and of the fifteen planes that were in the state on that day only eight were in the State during the entire day. (Amended Stipulation of Facts Paragraph VII.) This serves to emphasize the overexertion of the power of the State in assuming to impose a tax upon the entire fleet.

CONCLUSION.

The foregoing, it is submitted, compels the conclusion that a portion of the Airlines' fleet of planes has a physical situs without the State of Minnesota, and is therefore beyond the jurisdiction of the State in respect of taxation. As to that portion of its planes, the exaction of the tax in question would deprive the Airlines of its property without due process of law, in violation of the Fourteenth Amendment. This being considered the clearest ground against the validity of the tax, the equal protection and commerce clauses, which are more uncertain of application, will not be urged in this brief.

One more word on the importance of a decision by the ultimate judicial authority on the constitutional question here presented. The air transport business has had very rapid development and is still growing at an extraordinary rate. The tremendous impetus to that growth imparted by the present world war will undoubtedly carry through after the war and give the industry an importance in the national and world economy that will dwarf even its present